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Ministry of Municipal Affairs

BOARD OF VARIANCE GUIDE

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INTRODUCTION

This guide has been prepared by the Ministry of Municipal Affairs, Development Services Branch. It is designed to assist Boards of Variance and local governments in using the provisions of the Municipal Act to establish and administer Boards of Variance.

The first chapter outlines the function, structure and membership of Boards of Variance. The second chapter explains the grounds for appeal to a Board of Variance. Chapter Three outlines the type of Board of Variance decisions which are appealable to the courts and the appropriate basis for such appeals. Chapter Four discusses the operational principles and procedures which are to be followed by Boards of Variance. The final chapter addresses some specific problems of interpretation or confusion with procedures that have been brought to the Ministry's attention.

Sample bylaw provisions for establishing a Board of Variance are included as an appendix to illustrate what items may be addressed and how these may be prescribed in a bylaw.

Explanations are meant to clarify the occasions upon which the Board of Variance can be used as an avenue of appeal. Nothing in this publication is to be construed as a guarantee of legal certainty. It is only an interpretation of the intent of the legislation.

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* Throughout this paper a reference to "local government" includes municipalities, regional districts and the Islands Trust.

CHAPTER ONE

FUNCTION, STRUCTURE AND MEMBERSHIP OF A BOARD OF VARIANCE

Sections 726 and 727 of the Municipal Act specify the authority, structure and function of a Board of Variance.

A. Function

Where a council or regional district board(*) has enacted a zoning bylaw, the Municipal Act (Section 726) requires it to establish a Board of Variance by bylaw. The Board of Variance is an avenue for appeal on the interpretation and the strict application of certain local government provisions and regulations in specific circumstances defined in the legislation. It functions separately from the local government that established it and has its own authority under the Act.

The Board of Variance is not an appeal board for local government policy decisions and it cannot replace decisions of elected officials. The Board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of a bylaw adopted by a municipal council or regional district board. Variances can be granted respecting bylaw requirements for the siting, shape and size of buildings that are designed to deal with the most common circumstances and to be applied universally to these situations. In some special cases these general regulations may be hard to interpret for a particular lot or may not be equitable if applied to a particular site. A person may appeal to the Board only if the case fits within the specific circumstances defined in the legislation. Chapter Two explains those circumstances more fully.

B. Structure and Membership

A conventional rule of procedural fairness or "natural justice" is that there should be no bias on the part of the members of a tribunal. Such bias will be deemed to exist if there is any conflict of interest on the part of any person participating in the tribunal's deliberations. For that reason the legislation prescribes who cannot be a member of the Board of Variance and how appointments and removals from office can be made.

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* A reference to a council or regional district board in this document includes the thirteen trust committees of the Islands Trust.

1. Appointments

A Board of Variance will consist of three or five persons, depending upon total population of the local government area.

Appointment of members to the Board of Variance is by those government bodies that are responsible for the enactments which are the basis of appeal. The council of a municipality or the board of a regional district will appoint one member or two members depending on the size of the population within its jurisdiction. The Minister of Municipal Affairs will appoint one member or if the council has appointed two, the Minister will appoint two. The remaining member of the Board is appointed by the already appointed members. (Section 726(1)).

Because its responsibilities include both assessing the correctness of certain interpretations of regulations given by staff of the local government and modifying strict application of siting regulations of local government, the members of the Board of Variance cannot be members of an advisory planning commission, elected officials or employees of the local government for which they would be a Board member.

2. Removal From Office

Members appointed by local government may be removed at any time by resolution of that local government. Likewise, the appointees of the Minister of Municipal Affairs may be removed by the Provincial government through an order of the Lieutenant Governor in Council. The Municipal Act does not make special provision for removal from office of the person appointed by the other members of the Board of Variance. The legislation seems to assume the appointees' selection would always be the chairperson. Since the Lieutenant Governor in Council, with the approval of the local government, may remove the chairperson, the same procedure would seem to apply to the Board member who is appointed by the other Board members.

The legislation does not require that reasons be given for the removal of a member of the Board of Variance, it simply states that those bodies which appointed them can also remove them.

CHAPTER TWO

APPEALS TO BOARDS OF VARIANCE

This chapter reviews the exact wording of the legislation which establishes the responsibilities of the Board of Variance. An explanation is given for each of the factors a Board must consider in making decisions specifically authorized by the legislation. The most significant sections of the Municipal Act which refer to Boards of Variance are cited in full in Appendix I.

A. Categories of Appeal to Boards of Variance

The duties of the Board are specified in Section 727 of the Municipal Act. There are five grounds for appeal listed in 727(1), each of which involves different considerations. The precise wording of the Act is quoted here, and where there is a reference to another section, that wording is given as well. The five categories of appeal have been characterized as: 1) interpretation of certain bylaws; 2) destruction of a non-conforming building or structure; 3) relaxation of zoning regulations; 4) extension of non-conforming uses; and 5) relaxation of servicing requirements.

1. Interpretation of Certain Bylaws

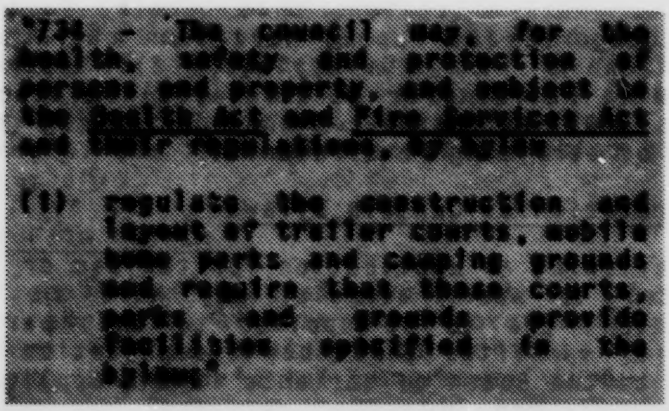
When reviewing an application for the use or development of a parcel, a staff official may have to interpret how regulations are to be applied to that parcel. Section 727(1)(a) specifies that the interpretation is subject to appeal to the Board of Variance if the applicant or another person affected by the decision disagrees with the official. More specifically, Section 727(1)(a) states:

> "727(1) - The board of variance shall hear and determine an appeal
>
> (a) by a person aggrieved by a decision of an official charged with the enforcement of a zoning bylaw or a mobile home park under Section 734(1) so far as the decision relates to an interpretation of the bylaw;"

The reference to a zoning bylaw brings in those matters regulated under Section 716. These include the use of land, buildings and structures; siting, size and shape of structures, and off-street parking and loading regulations.

Although most appeals are lodged by applicants for a building permit, the wording of the legislation also enables an appeal to be initiated by anyone affected by an official's interpretation of the zoning bylaw. A neighbour, for example, could disagree with the issuance of a building permit because he or she thinks the building inspector misinterpreted a zoning bylaw.

Section 727(1)(a) applies not only to zoning bylaws, but also to regulation of mobile home parks under Section 734(i). The reference in 727(1)(a) applies specifically to mobile home park bylaws only and does not extend to the other regulations in 734(i) for trailer parks or campgrounds. The mobile home park bylaw may include servicing standards as well as siting and development considerations. The application of such requirements may be the subject of disagreement and, therefore, appeal. Section 734(i) states:


"734 - The council may, for the health, safety and protection of persons and property, and subject to the Health Act and Fire Services Act and their regulations, by bylaw

(i) regulate the construction and layout of trailer courts, mobile home parks and camping grounds and require that those courts, parks and grounds provide facilities specified in the bylaw"

The "interpretation" of a zoning bylaw or a mobile home park bylaw must lead to a "decision" by an official. The basis of an appeal under Section 727(1)(a) would be that an approval was granted or denied because an official did not interpret the bylaw requirements correctly.

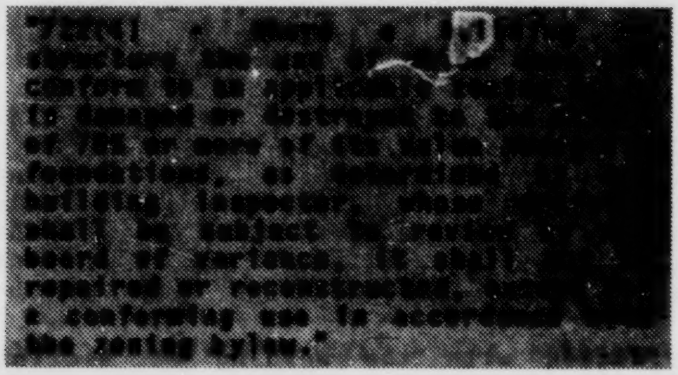
An example is a building inspector's refusal to issue a building permit because the location of the building on the lot would not satisfy setback requirements of the zoning bylaw. If the applicant for the permit believes that the particular siting provision does not apply or that the inspector has determined the actual location incorrectly and the building does in fact satisfy the setback, the applicant may appeal to the Board of Variance.

If the Board of Variance decides that the interpretation by the official was wrong it cannot order that official to issue a permit. However, its decision constitutes a declaration that the setback provision is not a valid reason for refusing the permit and if that had been the only reason for refusing the permit the official would be obliged to issue the permit. It is conceivable but unlikely that a person would have to resort to court action to force the official to issue a permit on the basis that no valid reason existed for refusal.

2. Reconstruction of A Non-Conforming Building or Structure

Certain decisions of a building inspector regarding repair or reconstruction of a building which does not conform to the zoning bylaws can be appealed to a Board of Variance under Section 727(1)(b) which states that an individual may submit an appeal:

Section 722(4) specifies:

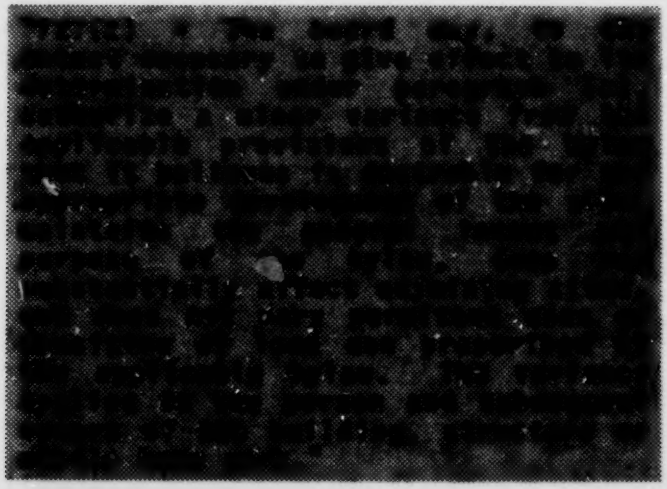


In this circumstance, if an applicant believes something less than 75% of the value of his building has been destroyed, the building inspector's decision may be appealed to the Board of Variance. If the Board concurs with the inspector, the owner of the non-conforming structure may not rebuild or repair that structure as the protection afforded by Section 722(4) for continuing the non-conforming use would cease.

3. Relaxation of Zoning Regulations and Qualifiers

Probably the most common type of appeal to Boards of Variance is a request for relaxation of zoning regulations under Sections 727(1)(c) and 727(2). Section 727(1)(c) states that an appeal can be made:

In 1977, Section 727(2) was amended to clarify the degree of modification to a local bylaw regulation that a Board could allow under Section 727(1)(c). The Board must carefully follow the limiting guidelines in order for decisions under this provision to be lawful. The following subsection is applicable only to Section 727(1)(c) and should be considered with it because it qualifies the circumstances under which zoning regulations can be modified.



In combination with the wording of Section 727(1)(c), Section 727(2) establishes criteria which the Board must be satisfied have been met before a variance can be granted. Even if a judge does not believe undue hardship existed in a case before him, providing there was evidence before the Board to enable it to make such a decision, he will rule the decision was valid.([1]) It is up to the Board, not the court, to decide if evidence is sufficient to satisfy each criterion. However, the Board may have to prove evidence was presented on each of the criteria. The criteria established in the legislation are as follows:

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1 Min-En Laboratories Limited v. North Vancouver Board of Variance and Prossegger Construction Limited (1978), Vol. I, S.C.R. 696, Mr. Justice Spence

a. "Hardship" - The application of requirements of the bylaw must create a hardship. Increased cost or loss of an amenity is a hardship but is unlikely to be a sufficient reason on its own.

b. "Undue" - The hardship created must be undue. The intent of this term is to limit the concerns of the Board to types of hardship that result from aspects of the site as opposed to ones generated by the owner. If a characteristic of a site is that bedrock protruding in the site's building area makes compliance with the siting provisions of a bylaw difficult and unreasonable, the hardship created, through no fault of the property owner himself, is undue. If other properties in the zone do not have the protruding rock, they would not be subject to the same degree of hardship.

   The difficulty in determining what is undue hardship revolves around whether the hardship would have been a hardship for everyone. If compliance with the general setback regulations is difficult or expensive but that is the case for all properties within that zone, then one could not argue there is undue hardship. If a circumstance penalizes one or a few owners only, it would be unfair and unduly onerous.

c. "Minor variance" - This terminology limits the scope of the variances the Board may allow. Relaxation of a requirement of a bylaw cannot be a substantial variation. Because the statute limits the Board's authority in this way, the Board must consider this point most carefully. The courts may review the scope or degree of a variation permitted by the Board.

d. "Appropriate development" - The interpretation of this terminology is clearly a matter of the Board's opinion in view of the wording "...that it (the Board) believes is desirable for the appropriate development of the site." A simple test would be to compare the proposed development with that existing on surrounding lots. The elected officials have considered the appropriateness of such matters as setback requirements when specifying them in a zoning bylaw. If these are 'appropriate' for surrounding properties, the Board should determine why it would not be equally appropriate for the particular property which is the subject of appeal.

e. "Maintains the general intent and purpose of the bylaw". The Board must try to determine, from reading the bylaw, the intention of the municipality or regional

district in establishing the regulations. Any variance should not disrupt the basic harmony with other developments within a zone.

f. "Does not substantially affect adjoining sites" - It is the Board's obligation to determine if the variance requested would cause significant impact on surrounding properties. A petition circulated by the applicant to adjoining owners indicating consent to the variance, although a helpful indication, does not necessarily satisfy this requirement. The Board must decide the issue.

g. "Does not vary permitted uses or densities" - Variations allowed by the Board cannot change use or density. Such changes are not minor and may only be made by the elected officials amending the zoning bylaw. That process requires such changes to be subject to full public scrutiny.

The issue of density may add complexity where changes to setbacks, or the size and shape of a building, change the building to an extent that the density of use could be altered. However, as long as any increase in density is within the limits established in the bylaw there would not be a problem.

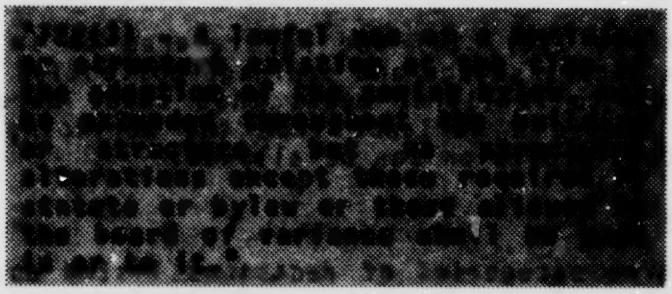
For example, relaxation of a 20 metre setback for an apartment building may allow a larger building to be constructed on the site. It should be clear in the decision that such a relaxation does not give any special right to the developer to increase the number of units over that allowed by bylaw simply because a larger building is now possible. More units would be an increase in density.

h. "Variance applies to the person and subsequent owners" - A variance allowed on a parcel applies to the zoning regulations for that particular parcel. It is issued to the land owner and applies to subsequent land owners. A change in ownership in itself does not necessitate a re-application for a variance. However, because there is no requirement for a central registry of variances, it is often difficult to determine when a variance has been sanctioned. The onus is on each local government to maintain a record of variances to assist subsequent owners as well as its own building inspectors.

4. Extension of Non-Conforming Uses

A non-conforming use is not confined to only that part of a building occupied when non-conformity was established. It can be extended to the whole building, but an owner needs special approval from the Board of Variance under Section 727(1)(d) and 722(3) to make internal structural alterations or add on to the building. In this regard, Section 727(1)(d) states that a Board may make decisions:

Section 722(3) specifies:



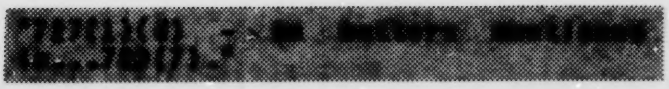
When structural alterations of a non-conforming building have been approved by a Board of Variance, these changes must also meet the requirements of statutes, including regulations under statutes, and any other bylaw provisions applicable at the time.

A structural change is not the same as a repair; rather, it is a modification to a floor, or roof, or bearing wall whether an internal or an outside wall. A new doorway in a bearing wall would be a structural change whereas new panelling or new shingles on a roof would not.

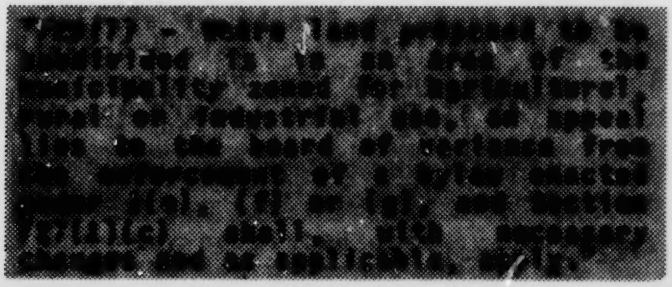
The Board of Variance is not restricted by the legislation to any particular types of cases for approval of structural changes, and it is not guided by the careful wording of Section 727(2) described on page 7. In effect, the Board may review each case on its own merit.

5. Relaxation of Servicing Requirements

Boards of Variance may approve the relaxation of servicing requirements for subdivisions on the basis of Sections 727(1)(d) and 729(7). Section 727(1)(d) specifies that a Board of Variance has authority to decide:



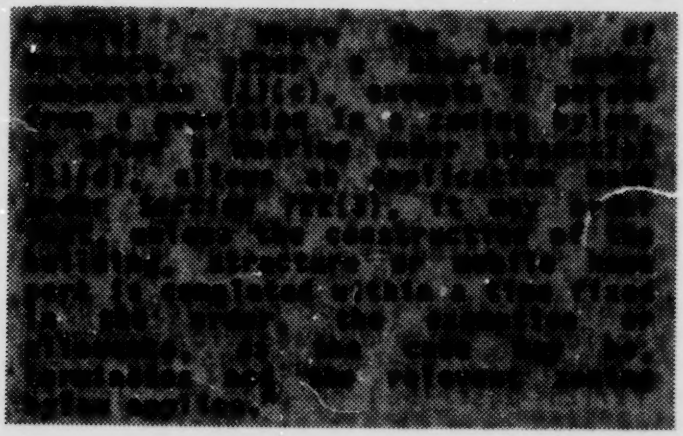
Section 729(7) states:



Subsections 1(e), (f) and (g) refered to in this section require water, sewage and drainage collection systems. The reference to 727(1)(c) means that undue hardship must be proven before a variance from the servicing requirements under this provision can be allowed.

B. Time Limits

The last three categories of decisions listed above deal with the relaxation of requirements, and the Board may establish a time limit within which construction must be completed.



If a person does not proceed with the development or construction for which the variance applies within the stated time limit, the development becomes subject to the full provisions of the zoning bylaw once again. The Board's decision is site specific and related to the circumstances existing at the time of the appeal and within the time limit set by the Board. Beyond the expiry date the circumstances may have changed and the variance probably should be re-evaluated.

C. Summary of Categories of Appeal

The table on page 13 provides an overview of the various types of appeal to Boards of Variance, offers examples of each category and notes the availability of further appeals from Board of Variance decisions. (Appeals from Board of Variance decisions are discussed in more detail in Chapter Three).

TABLE 1
TYPES OF APPEAL TO BOARDS OF VARIANCE

Categories of Appeal To a Board of Variance	Basis	Examples	Is There a Further Appeal?
1. Interpretation of certain bylaws (Section 727(1)-(2)).	Person aggrieved by an official's interpretation and decision related to a zoning or mobile home park bylaw.	Disagreement with interpretations on use of land, siting of buildings and structures. Siting, sizing and shape of structures, off-street parking and loading; and servicing standards, siting and development of mobile home parks.	If the appeal is refused, the applicant may appeal to County Court and its decision may be further appealed to a higher court by either the applicant or the local government. Procedural matters also appealable to a higher court.
2. Reconstruction of a non-conforming building or structure (Section 727(1)(b)).	Applicant disagrees with the decision of a building inspector that 75% of value of building has been destroyed and hence cannot be rebuilt in non-conformance to the zoning.	Following fire or other destruction, a building inspector determines extent of damage. If damage is more than 75%, the new structure must conform with zoning bylaw, but the determination of extent may be challenged.	Same as above.

Categories of Appeal To a Board of Variance	Basis	Examples	Is There a Further Appeal?
3. Relaxation of a zoning regulation (Section 727(1)(c)).	Person alleges that undue hardship would result from enforcement of bylaw. Board must comply with criteria prescribed by legislation including maintain intent and purpose of bylaw, not substantially affect adjoining sites, and not vary permitted uses or densities. The Board may specify time limits for construction.	Desire for variance on siting, shape or size of building or structure or siting in a mobile home park.	Procedural matters are appealable to a higher court, but decisions are not.
4. Extension of non-conforming uses (Section 727(1)(d)).	Owners of a building or structure which is a non-conforming use requires a variance to structurally alter or add on to a building. The Board may specify time limits for construction.	A structural change which is a modification of a floor, roof or bearing wall.	Procedural matters are appealable to a higher court, but decisions are not.
5. Relaxation of servicing requirement (Section 727(1)(d)).	Owner alleging undue hardship can apply for relaxation of servicing requirement if can prove undue hardship. Board may specify time limits for development.	Owner of property proposed for subdivision in area zoned for agricultural, rural or industrial use desires a relaxation of sewage, water or drainage requirements.	Procedural matters are appealable to a higher court, but decisions are not.

CHAPTER THREE

APPEALS FROM BOARD OF VARIANCE DECISIONS

Any decision of a tribunal like the Board of Variance may be assessed by the courts under the Judicial Review Procedures Act which requires that proper procedure is followed. In addition some Board of Variance decisions may be appealed to the courts as incorrect. There are two categories of decisions made by a Board of Variance. The first set of decisions are quasi-judicial which means they are in the general manner of the courts. These decisions, provided for in Sections 727(1)(a) and (b), deal with an assessment of a staff interpretation of local government regulations and can be challenged in the courts as incorrect assessments.

The second category of decisions involves a Board opinion on the justification for a variance and modifies the application of a general regulation. These decisions, provided for in Sections 727(1)(c) and (d), are matters of opinion delegated by statute to the Board. They are not a judgement of someone else's opinion and cannot be challenged in the courts as incorrect.

A. Decisions Appealable to the Court

As noted in Chapter Two, an individual who feels that a staff member has not interpreted requirements of a zoning bylaw or mobile home park bylaw correctly may appeal to the Board of Variance for a judgement on the correctness of staff interpretation. Also, a decision by a building inspector on the extent of damage to a non-conforming building, can be appealed to the Board of Variance. The judgement of the Board in these cases is with respect to the appropriateness of the interpretation made by the staff member. A decision of this nature can be appealed to the courts and in this case it would be the County Court.[2], [3]

The decision of the County Court on a Board of Variance decision under Section 727(1)(a) (interpretation of a zoning bylaw or a mobile home park bylaw) or Section 727(1)(b) (reconstruction or repair of a non-conforming building after destruction) can subsequently be appealed to a higher court.

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2 Regional District of Nanaimo v. Gordon M. Holtby (1979), B.C.D. Civ. 3004-02, Judge Millward

3 Inglis v. The Corporation of the Village of Qualicum Beach, (1981), 30 B.C.L.R. 270, Judge Melvin

The initiator of the original appeal is not the only one who can ask the courts to review a Board's decision. An example of the counter appeal process is a case where a homeowner was unhappy with the interpretation of a bylaw made by a building inspector in refusing a permit for extension to a non-conforming house. The owner appealed to the Board of Variance who disagreed with the inspector's interpretation and said he had erred in his refusal of the extension. The local government then appealed the Board's decision in County Court and requested the court to reverse the decision. Thus, the decision of the Board was challenged by the building inspector, or rather the employer on his behalf.

In another example the court upheld a Board of Variance decision which supported the building inspector's interpretation of a bylaw which was the basis for his refusal of a permit. The dispute arose over differing interpretations of wording in a bylaw. The court held that the bylaw was clear but it brought up another issue, namely, that the local government itself has no special right to make an interpretation of its bylaws. It is a local government's responsibility to ensure that its bylaws are written in an absolutely clear manner. The courts have repeatedly upheld that responsibility.(4) Mr. Justice Bouck explained the principle very clearly when commenting on the testimony given by a planner in explaining the intent of a bylaw. He stated that such testimony is inadmissable because the intent of a bylaw must be found in the bylaw itself.(5)

Thus, a municipality or regional district may argue about the intention of a bylaw in a court of law but generally the courts have considered face value only. For that reason, often a court decision will be based on a dictionary definition of a word used in a bylaw not on what a council or regional district board says it meant.

B. Decisions Not Appealable to the Court

The second category of decision is one for which the Board of Variance is given complete authority. The legislation allows the Board under certain circumstances to modify some provisions of the general regulations of relevant local government bylaws.

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4 George Alex Rogers et al v. The Corporation of the District of Saanich et al (1983), 2[illegible] M.P.L.R. I, Mr. Justice Locke

5 Capital Regional District v. The Corporation of the District of Saanich (1980), 24, B.C.L.R. 154, Mr. Justice Bouck

The actual decisions in this category may not be appealed in the conventional sense, although they may be reviewed for procedural fairness under the Judicial Review Procedure Act. Where the Board has determined that undue hardship has or has not resulted it is taken as fact by the courts and is not subject to appeal.(3)

C. Judicial Review

Under the Judicial Review Procedure Act the courts can require a Board to re-hear an appeal on the basis of procedural error of law, such as improper notice. In such cases the initial decision of the Board is invalid and must be made again. However, the courts may not direct that a certain decision be made following an appeal on procedural matters, as only the procedural fairness or jurisdiction is being challenged not the correctness of the final decision. To answer such a challenge, the Board may have to demonstrate that evidence existed which allowed it to assess the procedural criteria the statute requires be considered. However, its opinion on each of the criteria cannot be challenged. If the court felt correct procedures were not followed or the Board had no evidence upon which to base an opinion, it may order the Board to re-hear an appeal.

For example, the Act requires notice be mailed to owners of properties adjacent to the property subject to appeal. In a recent court case, notices were not mailed to owners separated by a 50 foot road allowance from the subject property. The court found these owners were "adjacent" and should have received notice. The Board of Variance had to re-hear the appeal after giving notice. The court did not direct the original decision be challenged, only that the application be re-heard.(6)

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3 Inglis v. The Corporation of the Village of Qualicum Beach, (1981), 30, B.C.L.R. 270, Judge Melvin

6 The Owners, Strata Plan No. 60 v. Town of Sidney (1981), B.C.D. Civ. 3006-01, Judge Wallace

CHAPTER FOUR

OPERATIONAL PRINCIPLES AND PROCEDURES

The Municipal Act requires that a Board of Variance follow certain procedures but allows other procedures to be prescribed by a bylaw of the local government establishing the Board.

Members of the Board of Variance do not receive compensation for their work. However, their individual expenses and all of the operating expenses of the Board are covered in the annual budget of the local government. This cost is considered to be part of the local government's responsibility to ensure equitable treatment of its citizens with respect to matters within its jurisdiction.

The legislation specifies that a majority of the Board is a quorum and that determinations will be made on the basis of a majority of Board members. The legislation requires that the chairperson be selected by the members of the Board themselves and allows the chairperson to appoint a Board member to act as chairperson in situations where he or she must be absent.

The Act requires that before a hearing the Board notify the owners and occupiers of all real property adjacent to the property subject to appeal.

The responsibility of local government extends only to the establishment of the Board and payment of operating expenses. The Board operates separately and autonomously under the specific authority of the Municipal Act, and there are no requirements in the Act for the local government to be notified of every appeal. The local government may set procedures not covered by the Act itself providing always that such procedures are generally fair.

The following two sections of this chapter identify procedural items that may be established by bylaw. A description of some considerations in determining procedural issues is included for illustrative purposes.

A. General Principles

A local government may specify, in its bylaw establishing the Board of Variance, procedures for giving public notice of any hearing that is held. Presumably the elected council or regional board is most fully aware of the needs of the community for public review of such appeals and ultimately will be responsible for paying the cost of such notification.

The procedures established by bylaw, however, may not imply guidance or control over the discretion granted to the Board for making decisions. It is important to maintain the distinction between the interests of the local government in designing general zoning regulations and responsibilities of the Board of Variance in varying servicing and siting requirements. The considerations by the Board are not a matter of local government policy and they do not replace such policy. An appeal may only be allowed if the general policy and intent of the bylaw regulations are maintained. The involvement of elected officials in appeals to the Board thus is unwarranted.

Nothing in a procedural bylaw may lessen the statutory authority of a duly constituted Board. The adjectives used within Section 727(2) of the legislation, such as "substantially", and "appropriate", indicate the discretionary nature behind some of the decisions which the Board can make. These terms really indicate the intent of the Legislature to enable some flexibility in the application of local government regulations. A Board of Variance's decision involving the relaxation of local government regulations cannot be appealed to a higher court or the Minister and cannot be reversed by succeeding Boards.

A local government bylaw establishing procedures may allow the Board to get information from technical staff on the requirements of the zoning bylaw and the physical dimensions and characteristics of a lot. The local government bylaw establishing procedures cannot require that local government be heard on every appeal. That would be interpreted as trying to assign special rights to itself which may prejudice the hearing. However, it can provide a way for the Board to get technical information.

For those appeals that challenge an official's interpretation of a bylaw provision, a procedural bylaw may require that the official whose actions are being reviewed be heard by the Board. This grants the official the right to explain his interpretation which is the subject of the appeal and complies with commonly accepted principles of natural justice or procedural fairness that protect a person whose judgement has been questioned.

B. Hearings

The Board of Variance is given authority to hold its own hearings on any matters before it. The Board may decide whether a particular hearing will be public or this may be established by a local government in the procedural bylaw. While there is no rule that specifies when a Board of Variance

hearing should be public, it is possible that some new precedents will develop as a result of the Charter of Rights and Freedoms. In the future, it may be less a decision of the Board and more a constituted right that determines when a hearing will be public.

As noted above, provision should be made for an official, whose interpretation is being appealled, to be heard. Also, anyone who was served notice of an appeal has the right to be heard by the Board in accordance with the principles of natural justice.

C. Sample Bylaw Provisions

The reader with an interest in procedural matters may wish to examine the "sample bylaw provisions" in Appendix 2, which indicate how procedures described in this chapter can be defined. The sample bylaw is designed to ensure that all appeals are treated promptly and that matters before the Board are disclosed publicly although it does not require that all hearings be held in public, which is left to the discretion of the Board. The bylaw assumes all parties involved in the issue have a right to be heard.

CHAPTER FIVE

POTENTIAL PROBLEMS

A. Development Permits

A zoning bylaw or amendment may provide for the issuance of development permits by a council or regional board in order to vary or supplement certain regulations under special circumstances defined in the legislation. The permit may be voluntary and, therefore, designed with the agreement of the applicant or it may be imposed in areas defined by bylaw.

Variances granted by a Board of Variance are not the same as development permits. The Board deals only with matters where, in its opinion, there has been a misinterpretation of the regulation or undue hardship will be incurred by an individual if he must comply strictly with certain regulations. Development permits and variances are entirely different.

This does not mean that an application for one appeal precludes an application to the other authority. If an appeal to a Board of Variance fails because the Board does not believe the variance is justified or because undue hardship has not been shown, and thus the appeal is not within its jurisdiction, the applicant may approach the council or regional district board in an attempt to achieve the same end through a development permit. However, development permits are intended to apply only where a development is to be initiated. They should not be used as a retroactive agreement to legalize the contravention of a siting provision.

A council or regional district board has the authority at any time to amend siting regulations in a zoning bylaw. It also has the authority to negotiate a development permit to vary some of the regulations that are contained within a zoning bylaw. If a development is proposed, then a council or regional district board may use a development permit to allow the extension of a building, whether or not that building conforms to the siting provisions of the bylaw.

The Board cannot hear an appeal to vary a provision in a development permit. Only a council or regional district board may amend a development permit. A development permit itself is a variance of zoning regulation, and is outside the jurisdiction of a Board of Variance.

B. Other Land Use Regulation

Some local governments choose to include building and subdivision regulations within a general zoning bylaw. However, this does not expand the authority of the Board of Variance to deal with any matters that are not zoning matters pursuant to Section 716 of the Municipal Act. The matters that the Board of Variance may consider are specified in the legislation by section number or by reference to a "zoning bylaw". It is not possible to extend the authority of the Board of Variance merely through the enactment of a bylaw that encompasses a variety of subjects which are based on enabling provisions of the Municipal Act other than Section 716. Similarily, the Board of Variance may not consider changes to Provincial regulations for agricultural land reserves or floodplains.

C. Liability

There is no protection within the Municipal Act against liability for decisions made by elected, appointed, or employed individuals. Because the authority does not exist in the legislation, it cannot be created by enactment, of a lower level of government. Therefore it is not possible for a local government, through a bylaw or any other enactment, to remove liability for the responsibilities of any bodies or staff appointed under the authority of the Municipal Act.

However, the courts commonly will not attach liability to a decision made in good faith. If procedures and actions taken were fair, action for compensation for damages cannot be initiated against a member of a judicial or quasi-judicial tribunal on the basis of any mistaken decision made by that tribunal. As long as a member of a Board of Variance acts in a legal and responsible manner, a decision made by that member is not a basis for liability. Again, it is possible the Charter of Rights and Freedoms may assist by defining fairness or so called "common law" or "natural justice" which will formalize these principles.

SUMMARY

This publication is intended to clarify the purpose and function of a Board of Variance under the provisions of the British Columbia Municipal Act.

The provisions of the Municipal Act do not extend any special rights of representation to the local government that establishes a Board of Variance. These Boards function separately under their own authority. As a quasi-judicial tribunal they must be meticulous in preventing any bias in their actions.

A Board of Variance may not make decisions that change the intent and purpose of bylaws adopted by a local government. It may rule on the appropriateness of a staff interpretation of a zoning and mobile home park bylaw provision and may allow minor variance of some provisions under specified circumstances. Members of a Board of Variance are not elected and they may not make or change policy decisions of local government.

A bylaw to establish a Board of Variance can set down very general procedures or prescribe detailed procedures for presentation of evidence and notification. The level of detail appropriate will depend on the needs of the individual area. The sample bylaw provisions provided in the appendices illustrate the maximum formality from which each jurisdiction may select a level of detail suitable for their needs.

APPENDIX 1

SECTIONS OF THE MUNICIPAL ACT WHICH REFER TO THE BOARD OF VARIANCE

Buildings Under Construction

722 (1) - A building or structure lawfully under construction at the time of the coming into force of a zoning bylaw shall, for the purpose of that bylaw, be deemed to be a building or structure existing at that time.

(2) - A lawful use of premises existing at the time of the adoption of a zoning bylaw, although the use does not conform to the bylaw, may be continued; but if the non-conforming use is discontinued for a period of 30 days, any future use of the premises shall conform, subject to this section, to the zoning bylaw.

(3) - A lawful use of a building or structure existing at the time of the adoption of the zoning bylaw, although the use does not conform to the zoning bylaw, may be extended throughout the building or structure, but no structural alterations except those required by statute or bylaw or those allowed by the board of variance shall be made in or to it.

(4) - Where a building or structure the use of which does not conform to an applicable zoning bylaw is damaged or destroyed to the extent of 75% or more of its value above its foundations, as determined by the building inspector, whose decision shall be subject to review by the board of variance, it shall not be repaired or reconstructed, except for a conforming use in accordance with the zoning bylaw.

(5) - A change of tenants or occupants of the building or structure shall not be deemed to affect the use of the building or structure within the meaning of this section.

Board of Variance

726 (1) - Where a council has adopted a zoning bylaw, there shall be established by bylaw a board of variance constituted:

(a) where the population of a municipality is 25,000 or less, of one person appointed by the council, one person appointed by the minister and one person appointed by the other 2 appointees; and

(b) where the population of a municipality is more than 25,000 of 2 persons appointed by the council, 2 persons appointed by the minister and one person appointed by the other appointees.

(2) - The members of the board shall elect one of their number as chairman. Each member appointed shall hold office for a term of 3 years or until his successor is appointed, but a person may be reappointed for further terms.

(3) - A person who is a member of the advisory planning commission of the municipality or holds municipal office or municipal employment in the municipality is not eligible to be appointed or to sit as a member of the board of variance for the municipality.

(4) - A majority of the board is a quorum.

(5) - The chairman may from time to time appoint a member of the board as acting chairman to preside in the absence of the chairman.

(6) - In the event of the death, resignation or removal from office of a member of the board, his successor shall be appointed in the manner in which the member was appointed, and until the appointment of his successor the remaining members constitute the board.

(7) - A council may remove its appointee at any time, the Lieutenant Governor in Council may remove the Minister's appointee at any time and, on the recommendation of a council, the Lieutenant Governor in Council may remove the chairman at any time.

(8) - In the event of the death, resignation or removal from office of a member of the board, other than the chairman, the chairman shall continue to act in that capacity, and the provisions of subsection (2) relating to the appointment of a chairman do not apply.

(9) - In a bylaw adopted under subsection (1) there shall be set out the procedures to be followed by the board of variance, including the manner in which appeals are to be lodged with the board and the giving of notices required under section 727.

Duties of Board

727 (1) - The board of variance shall hear and determine an appeal:

(a) by a person aggrievd by a decision of an official charged with the enforcement of a zoning bylaw or a

mobile home park bylaw under section 734(1) so far as the decision relates to an interpretation of the bylaw;

(b) on matters mentioned in section 722(4);

(c) by a person who alleges that enforcement of a zoning bylaw on siting, shape or size of a building or structure, or siting in a mobile home park under a mobile home park bylaw, would cause him undue hardship; and

(d) on matters mentioned in sections 722(3) and 729(7).

(2) - The board may, to the extent necessary to give effect to its determination under paragraph (c), authorize a minor variance from the applicable provisions of the bylaw that it believes is desirable for the appropriate development of the site, maintains the general intent and purpose of the bylaw, does not substantially affect adjoining sites, and does not vary permitted uses or densities of land use prescribed by the applicable bylaw. The variance applies to the person and subsequent owners of the building, structure or mobile home park.

(3) - Notification of the appeal shall be given by the board to the owners and occupiers of all real property located adjacent to the property about which the appeal is being heard, and public notice of the hearing shall be given if the matter is deemed by the board to be of sufficient importance.

(4) - The decision in writing of all or a majority of the board members is the decision of the board.

(5) - Where the board of variance, after a hearing under subsection (1)(c), exempts a person from a provision in a zoning bylaw, or after a hearing under subsection (1)(d), allows an application made under section 722(3), it may order that, unless the construction of the building, structure or mobile home park is completed within a time fixed in the order, the exemption or allowance, as the case may be, terminates and the relevant zoning bylaw applies.

(6) - An appeal lies to the County Court from a decision of the board under subsection (1)(a) or (b), but all other decisions of the board are final and binding.

Expenses of Board

728 (1) - A member of a board of variance shall not receive compensation for his services other than allowances for actual expenses necessarily incurred in the discharge of his official duties.

(2) - The council shall include in its annual budget the sums necessary to defray the expenses of the board.

Regulations and Procedure for Subdivision

729 (1) - The council may regulate the subdivision of land, and for that purpose may by bylaw:

(a) regulate the area, shape and dimensions of parcels of land and the dimensions, locations, alignment and gradient of highways in connection with the subdivision of land, and may make different regulations for different uses and for different zones of the municipality;

(b) prescribe minimum standards for matters in paragraphs (a) and (d);

(c) require that a proposed subdivision be suited to the configuration of the land being subdivided, and to the use intended, and does not make impracticable the future subdivision of the land within the proposed subdivision or of the adjacent land;

(d) require that the highways within the subdivision be cleared, drained and surfaced to a prescribed standard, including the construction of sidewalks and boulevards, transit bays and the installation of street lighting and underground wiring, and may prescribe different standards, provisions and uses in different zones of the municipality;

(e) require that the subdivision be provided with a water distribution system in accordance with the standards set out in the bylaw and, if the municipality operates a water utility, require that the distribution system be connected by trunk water mains to the municipal water utility trunk water mains in accordance with the standards set out in the bylaw, or otherwise require that it be connected to a community water system or that each parcel in the subdivision have a proved source of potable ground water in a quantity specified in the bylaw;

(f) require that the subdivision be provided with a sewage collection and disposal system in accordance with the standards set out in the bylaw and, if the municipality operates a sewage disposal system, require that the collection system be connected by trunk sewage mains to the municipal trunk sewage mains in accordance with the standards set out in the bylaw; and

(g) require that the subdivision be provided with a drainage collection system in accordance with the standards set out in the bylaw and, if the municipality operates a trunk drainage system, require that the collection system be connected by trunk drainage mains to the municipal trunk drainage system in accordance with the standards set out in the bylaw.

(2) - Subject to section 732, the owner of land being subdivided shall provide, without compensation, land for highways in accordance with a bylaw under subsection (1).

(3) - Every approving officer shall give regard to any official community plan when dealing with applications for the approval of a plan of subdivision.

(4) - The approving officer may refuse to approve a subdivision plan if he believes the cost to the municipality providing public utilities or other municipal works or services would be excessive.

(5) - The council may by bylaw provide that where a subdivision has been provided with sewer, water and drainage facilities under subsection (1)(e), (f) and (g), or any of those facilities, the charges imposed by the municipality for the capital cost of works of a similar nature will be waived or lessened for a period of time that it considers sufficient to pay that capital cost.

(6) - A bylaw that includes provisions authorized under subsection (1)(e), (f) or (g) may provide for sharing all or part of the cost of a trunk water, sewage or drainage main between the municipality and the owner of the land proposed to be sudivided, or of the land proposed to be subdivided and the owners of any other land that will benefit from the main, and the municipality may require that a portion of the water, sewage of drainage system be provided with a capacity in excess of that required to service the proposed subdivision, but, in that case, shall provide that the cost of the excess capacity will

be paid for by the municipality, or by the owners of land outside the proposed subdivision.

(7) - Where land proposed to be subdivided is in an area of the municipality zoned for agricultural, rural or industrial use, an appeal lies to the board of variance from the enforcement of a bylaw enacted under subsection (1)(e), (f) or (g), and section 727(1)(c) shall, with necessary changes and as applicable, apply.

(8) - In this Division "approving officer" means a person appointed as an approving officer under the Land Title Act.

(9) - All works and services required to be constructed and installed at the expense of the owner of land proposed to be subdivided under a bylaw under this section shall be constructed and installed to the standards prescribed in the bylaw prior to the approval of the subdivision by the approving officer, unless the owner of the land:

(a) deposits with the municipality a bond in the form and amount, if any, prescribed in the bylaw or otherwise, in a form and amount satisfactory to the approving officer having regard to the cost of installing and paying for all works and services required pursuant to the bylaw; and

(b) enters an agreement with the municipality to construct and install the prescribed works and services by a specified date or forfeit the amount secured by the bond to the municipality.

(10) - The owner of land being subdivided shall provide, without compensation, land for public open space in the locations and to the extent required by the approving officer for the purpose of providing sufficient open space within the proposed subdivision for park and public use.

(11) - Where land being subdivided adjoins a lake, river, stream or other body of water, the approving officer, as a condition of approving the subdivision, may require the dedication, without compensation, of a strip of land not exceeding 7 m in width along the bank or shore to provide public access, if he believes it is in the public interest to do so.

(12) - Land to be dedicated shall be measured from the high water mark, the controlled high water mark, or the natural boundary of the lake, river, stream or other body of water as defined by the Land Act, whichever is applicable.

(13) - The amount of land required under subsections (10) and (11) shall not exceed 5% of the land being developed.

(14) - Subsections (10) to (13) do not apply to a subdivision of less than 3 lots, to a subdivision where the smallest lot being created is larger than 2 ha. or to consolidations of existing subdivided parcels.

APPENDIX 2

SAMPLE BYLAW PROVISIONS

Board of Variance

1. Establishment

Pursuant to Section 726 of the Municipal Act, a Board of Variance is hereby established.(7)

2. Secretary

The council (or regional district board) shall appoint a Secretary to the Board of Variance. The responsibilities of the Secretary are:

a) to receive notices of appeal;

b) to notify the chairperson of the Board of Variance of the receipt of notice of appeal;

c) to ensure that proper notification is given in compliance with this bylaw;

d) to keep proper records of the Board of Variance proceedings.

3. Meetings

a) A meeting of the Board of Variance shall be held on the first Wednesday of each month, unless otherwise determined by the chairperson of the Board of Variance in consultation with the Secretary and all other members of the Board of Variance.

b) In the event that no notice of appeal is deposited with the Secretary to the Board of Variance at least 7 calendar days prior to the date of the next meting, then no meeting need be held.

c) A meeting of the Board of Variance on a particular appeal shall be held not more than 40 days after the date of receipt of the notice of appeal unless an extension is allowed by the written consent of the appellant.

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7 An alternate wording which may be used by regional district boards is "Pursuant to Section 726 of the Municipal Act, a Board of Variance is hereby established for those areas of the regional district for which zoning bylaw "100" is applicable".

d) The Board of Variance shall be convened by the chairperson on the date of hearing and at the time and place set out in the notice.

e) The Board of Variance shall hear all representations made to the Board.

f) The deliberations of the Board of Variance shall not be open to the public.

4. Notice of Appeal

a) Any person desiring to appeal to the Board shall file a written notice of appeal with the Secretary of the Board. The notice shall state clearly the grounds upon which the appeal is based and the relief sought, and shall give an address to which all notices respecting an appeal hearing may be mailed.

b) Where the appeal is based upon a decision of any official charged with the enforcement of a zoning bylaw, or upon a determination of value made pursuant to subsection (4) of Section 722 of the Municipal Act, the notice of appeal shall be filed with the Secretary of the Board within 30 days of the making of the decision or determination as the case may be.

c) The Secretary, upon the filing of an appeal, shall forthwith notify the chairperson of the Board of the appeal.

d) Upon receipt of the notice of appeal by the Secretary, and the determination of a hearing date, the Secretary shall send by registered mail or otherwise deliver, not less than 7 days prior to the date of the hearing, notice of the hearing to:

i) the members of the Board of Variance;
ii) the appellant;
iii) the registered owners as shown on the last revised assessment roll and all occupiers of all real property located adjacent to the parcel about which the appeal is being heard.
(iv) if an appeal under 727(1)(a) or (b) the official whose interpretation is being appealed.

e) The notice of the hearing shall state the date, place and time of the appeal hearing and shall include a copy of the notice of appeal.

f) The Secretary shall upon receipt of any notice of appeal, or of any written evidence entered before the hearing, permit the same to be inspected at the Secretary's office during regular office hours.

g) Public notice of the hearing, if ordered by the Board, shall be given by publication of a notice stating the time and place of the hearing and the general nature of the appeal in not less than 2 consecutive issues of a newspaper published or circulating in the municipality (or electoral area), with the last such publication appearing not less than 3 days or more than 10 days before the date of the hearing.

5. Conduct of Hearing

a) Any person or body with interest in property within the municipality (or regional district) is entitled to be heard at the hearing and is entitled to be represented by a solicitor or by an agent duly appointed in writing.

b) Any person represented, in accordance with subsection 5(a), whether or not also attending in person, shall be deemed to be a party attending the hearing.

c) Evidence at a hearing may be given orally or in writing.

d) The Board shall not hear oral evidence except at a regularly constituted hearing.

e) No member of the Board shall discuss the merits of the appeal with any person who is not a member of the Board or the Secretary before the Board has reached a decision.

f) The appellant shall be afforded the first opportunity to present his evidence and arguments, and thereafter, evidence and arguments shall be presented in such sequence as the chairperson may direct until all parties to the appeal have been afforded an opportunity to present their evidence and arguments.

g) The Board may adjourn the hearing from time to time and may review the property affected by the appeal and surrounding properties.

h) If the appellant fails to appear at the hearing or any adjournment thereof, the Board may proceed to decide the appeal in his absence.

6. Decision

The Secretary shall:

a) within 7 days of a hearing, send by registered mail or otherwise deliver the written decision of the Board of Variance to the appellant, all persons who made representation at the hearing and the local government building inspector.

b) maintain a record of all variances and opinions given by the Board in an annual log. A copy shall be available for viewing by the public at all times during normal office hours.